Supreme Court, U.S.
FILED
JAN 15 1973
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT
of the
UNITED STATES

October Term 1972

No. 71-926

HERMAN A. STUHL, individually, in his own behalf, and in behalf of all tenants of DeLoy Executive Service, Inc., maintaining offices at 527 Madison Avenue, Borough of Manhattan, City, County and State of New York, similarly situated,

Petitioner,

--against--

527 MADISON AVENUE COMPANY, a limitd partnership,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Appellate Division
of New York Supreme Court

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Petitioner

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

HERMAN A. STUHL, individually, in his own behalf, and in behalf of all tenants of DeLoy Executive Service, Inc., maintaining offices at No. 527 Madison Avenue, Borough of Manhattan, City, County and State of New York, similarly situated,

Petitioner,

-v.-

527 MADISON AVENUE COMPANY, a limited partnership,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF NEW YORK SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the New York Supreme Court, First Judicial Department, entered on June 3rd, 1971.

OPINION BELOW

The opinion of the Appellate Division of New York Supreme Court, First Judicial Department. (App. A. infra) is not yet reported.

JURISDICTION

The judgment of the Appellate Division of New York Supreme Court, First Judicial Department, was entered on June 3rd, 1971. New York Court of Appeals denied petitioner's application to appeal further on November 17th, 1971. The jurisdiction of this Court is invoked under 28 USC 1257(3).

QUESTIONS PRESENTED

1. Whether, under the rulings in Bodie v. Connecticut, 91 Sup. Ct. 780, Mullane v. Central Hanover Bank and Trust Co., 339 US 306, 70 Sup. Ct. 652, Goldberg v. Kelly, 397 US 254, Snaidach v. Family Finance Corporation, 395 US 337, In re: Winship, 397 US 358 and Armstrong v. Manzo, 380 US 554, the "Due Process" clause of the Fourteenth Amendment to the United States Constitution was violated, when the petitioner's suit in New York Supreme Court for a judgment declaring his rights to occupy real property was dismissed upon the ground that the matter had been previously litigated in his absence in a prior suit to which he was not joined as a party nor given notice or opportunity to defend but to which he was bound?

2. Whether, under the rulings in Bodie v. Connecticut, 91 Sup. Ct. 780,

Mullane v. Central Hanover Bank and Trust Co., 339 US 306, 70 Sup. Ct. 652, Goldberg v. Kelly, 397 US 254, Snaidach v. Family Finance Corporation, 395 US 337, In re: Winship, 397 US 358, and Armstrong v. Manzo, 380 US 554, the "Due Process" clause of the Fourteenth Amendment to the United States Constitution was violated, when the New York Supreme Court determined the rights of non-joined parties to occupy real property in a declaratory judgment action?

STATEMENT OF FACTS

Petitioner, a subtenant, feeling threatened with possible eviction by the landlord's institution of two proceedings in the Civil Court of the City of New York to recover possession of real property from the prime tenant and sixty named subtenants, commenced an action in New York Supreme Court to have the rights of the subtenants determined with regard to their continued occupancy of the demised premises.

New York Supreme Court dismissed the action and therefore also denied injuntive relief against the eviction which relief was sought by the petitioner on the theory that the rights of the subtenants to occupy the demised premises was already determined in a prior declaratory judgment action commenced by the landlord against the prime tenant to which action the sixty subtenants were not joined as parties and to which action the sixty subtenants were not provided with notice of the pendency of such action nor given an opportunity to

be heard.

On July 7th, 1967, DeLoy Executive Service, Inc. ("DeLoy") entered into a lease with its then landlord, Madison-54th Realty Company ("Madison"). DeLoy, in turn, subleased the majority of the demised premises to others. On October 1st, 1967, after DeLoy had subleased the majority of the demised space to others, without notifying those subtenants, DeLoy surrendered its lease to its landlord and simultaneously obtained a new lease for a shorter duration, at a higher rental, for a shorter duration, and on terms less favourable to the tenant. Thereafter and on January 1st, 1968, Madison assigned its interest in the second lease (dated October 1st, 1967) to 527 Madison Avenue Company, a limited partnership, ("527"). Immediately after such assignment by DeLoy's landlord, DeLoy retained counsel who made demand upon 527 for the rescission of the second lease and the reinstatement of the former lease upon grounds of lack of consideration, fraud and the fact that it was later learned that DeLoy's attorney at the time of the surrender of the former lease and signing of the second lease was simultaneously employed by Madison in order to obtain DeLoy's surrender of the former lease.

In January of 1970, 527, feeling threatened by DeLoy's new position, commenced an action for declaratory judgment against DeLoy and two of its officers only seeking a declaration that the second lease was valid and subsisting over the first lease. A default judgment was entered in that action against DeLoy and one of its two officers, granting the

relief sought by 527 and declaring that the second lease is valid and subsisting over the first lease.

Thereafter 527 commenced two summary proceedings in the Civil Court of the City of New York for the recovery of possession of the demised space relying upon the prior determination as being dispositive of the factual issues.

Feeling threatened by the pending summary proceedings for the recover of real property occupied by him, petitioner then commenced an action in New York Supreme Court in his own behalf and in behalf of all tenants of DeLoy similarly situated to have the rights of the subtenants to occupy the demised property determined in a declaratory judgment action to which petitioner also joined as party-defendants Madison, 527 and DeLoy. 527 countered this move by applying for summary judgment against the petitioner on the grounds of res judicata stating that the subtenants were bound to the prior determination of the Supreme Court of New York in the prior action in which the subtenants were not joined as parties nor given notice nor opportunity to defend. New York Supreme Court granted the motion and dismissed the complaint which decision was also dispositive of the petitioner's application for a preliminary injunction to enjoin the eviction proceedings. The Appellate Division of New York Supreme Court affirmed and New York Court of Appeals declined to review the decision.

OPINION OF THE TRIAL COURT

The New York Supreme Court's opinion, (App. C, infra) in granting summary judgment to 527, held that the subtenants were bound to the original determination made in their absence and erroneously considered petitioner, the assignee of DeLoy's lease, as a month-to-month tenant.

OPINION OF THE APPELLATE DIVISION

The Appellate Division of New York Supreme Court's opinion, (App. A. infra) in upholding the decision of the lower Court, stated that the order denying DeLoy's application to vacate the original default declaratory judgment in the prior action was legally sound and skirted the real issues by stating that such opinion determines petitioner's rights.

SUMMARY OF THE ARGUMENT

The Court which rendered the original default declaratory judgment, in which the petitioner and all other subtenants were not joined nor given notice or opportunity to defend, lacked subject matter jurisdiction and accordingly its decree is nill and void. Subject matter jurisdiction in declaratory judgment cases can only be acquired when all interested parties are properly before the Court and full and final relief may be afforded to the parties.

Even assuming arguendo, petitioner and the other subtenants cannot, consistent with the notice and opportunity to

defend principles inherent in the "Due Process of Law" clause of the Fourteenth Amendment to the United States Constitution, be held to a judgment in a prior action to which they were not joined as parties nor provided with a meaningful notice or opportunity to be heard before the rendition of the judgment.

Petitioner and all of the other subtenants of DeLoy had a vested interest in the demised premises and any litigation affecting their rights to occupy the same. These subtenants, the actual occupants of the demised premises -- for Deloy was in the business of subletting as provided for in its two leases with 527 and its predecessor -- had a right protected by the Constitution to notice of any proceedings affecting their rights to occupy the demised premises and to a meaningful opportunity to be heard prior to the actual rendition of the decree curtailing their rights to occupy the demised premises. Accordingly, the decision of New York Supreme Court is easily interpreted as stating that these Constitutional rights of the subtenants to be heard and given notice of the prior action is non-existent by virtue of their existence as subtenants even though both leases with the landlord provided that DeLoy was in the business of subletting and would not actually use the majority of the demised premises itself. Weighing the equities, the subtenants occupied more than 50% of the demised premises and therefore had more to lose by any adverse decision affecting their rights to occupancy.

The secondary issue is whether the Supreme Court of the State of New York

even had subject matter jurisdiction to entertain the first action in the absence of the subtenants whose rights were determined thereby.

In Bodie v. Connecticut, 91 Sup Ct 780, a 1971 decision, in holding that poor people have a constitutional right to sue for divorce even though they are unable to pay the requisite Court fees, this Court stated:

> "Prior cases determined, first, that Due Process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of rights and duties through the Judicial Process, must be given a meaningful opportunity to be heard. Early in our jurisprudence this Court voiced the doctrine that whereever one is assailed in his person or his property, there be must be heard."

Although many controversies have raged about the cryptic and abstract words of the "Due Process" clause, as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Bank and Trust Co., 339 US 306, 70 Sup. Ct. 652, holding that publication service is not permissible where the actual residence is known, there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by Notice and opportunity to be heard appropriate to

the nature of the case. In the footnote to that decision, the Court cited no less than 15 supporting cases. Among them were Goldberg v. Kelly, 397 US 254, concerning a welfare recipient held constitutionally entitled to a hearing prior to suspension of benefits; Snaidach v. Family Finance Corporation, 395 US 337, in which prejudgment garnishment without a hearing was held unconstitutional; and In re: Winship, 397 US 358, holding that procedural Dur Process is required in juvenile proceedings.

In Armstrong v. Manzo, 380 US 554, a 1965 case, the Court further defined Due Process by stating that an elementary and fundamental requirement of Due Process in any proceeding which is to be afforded finality is notice reasonably calculated under all of the circumstances to apprise the interested parties of the pendency of the action and afford them a meaningful opportunity to be heard.

In Mullane v. Central Hanover Bank and Trust Co., supra, the Supreme Court recognized the rights of derrivitive beneficiaries and struck down Notice by publication as being legally insufficient to meet the requirement of Due Process of Law as guaranteed in the Fourteenth Amendment where the actual addresses of the beneficiaries are known, adding that it is not impractible to make serious efforts to notify them at lease by ordinary mail to their addresses on file with the bank. So too could 527 have notified all of the subtenants of DeLoy, whose name appeared in the building directory and were additional submitted to the landlord in accordance with the

lease.

Directly on point, in both Armstrong v. Manzo, supra, and Escalara v. N.Y.C.H.A., 420 F2d 1270, the Courts felt that any subsequent hearings at which the appellant was given an opportunity to be heard did not cure the constitutional infirmity of the original failure of proper notice and opportunity to be heard since in the second proceeding the Petitioner was forced to assume certain burdens of proof which had he been afforded notice of the prior proceeding would have rested with his adversary. Identical to the case at bar, in the Escalara case there were proceedings prior to the actual summary proceedings to recover possession of real property in the Civil Court of the City of New York, but which affected the outcome of the Civil Court proceedings and shifted the burden of proof.

We respectfully submit that the surrender of the prime lease by DeLoy was subject to an incumbrance (i.e. the subtenants) much the same way as one purchases real property subject to the rights of the tenants in possession.

Justice Curtis, speaking for the Court in the case of Shields v. Barrow, 17 How 130, 136, (1854) defined necessary parties to a declaratory judgment action as follows:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final

"decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

The absence of the subtenants as parties to the original declaratory judgment action becomes even more shocking to equity and good conscience when one realezes that the action was for declaratory relief. The Federal Courts have always held that when declaratory relief is sought, all parties shall be made parties to the action who have or who claim any interest which would be affected by the declaration (Samuel Goldwyn, Inc. v. United Artists Corp., 113 F2d 703; Stein v. Delano, 121 F2d 975, certiorari denied 62 S. Ct. 106, 314 US 655, 86 L.ed 525, rehearing denied 62 S. Ct. 178, 314 US 711, 86 L.ed 567, and rehearing denied 62 S. Ct. 359, 314 US 713, 86 L.ed 568; and Smith v. v. American Asiatic Underwriters Federal Inc., 127 F2d 754).

Particularly on point is Hudson v. Newell, 172 F2d 848, in which the Court held that in a declaratory judgment action seeking cancellation of a lease, judgment will not be granted where all of the interested parties are not brought before the Court.

IMPORTANCE OF THIS PETITION

This petition presents a situation where a state court has decided a federal

question of substance not heretofore determined by this Court, and has decided it in a way which is contrary to the applicable decisions of this Court.

Clearly, the Federal Courts have held that all interested parties are necessary parties to any action for declaratory judgment (pages 10-11, infra). So too have those states which have enacted the Uniform Declaratory Judgment Act. Section 11 of the Uniform Declaratory Judgment Act provides in pertinent part:

> "...all persons shal be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

At present, over thirty states have adopted the Uniform Declaratory Judgment Act and accordingly have the benefit of Section 11. Even those states who have not adopted the Uniform Declaratory Judgment Act generally have special provisions substantially equal if not exactly copied from Section 11 (Florida, Kentucky, Massachusetts, New Jersey, etc.)

Unfortunately, some states still do not have any provision in their statutes for declaratory judgments and some of the states who do have special provisions (as New York does with its Section 3001 of its Civil Practice Law and Rules) have vague statutes which do not clearly define the purposes or procedures of such an action.

Even though New York does not have the benefit of Section 11 of the Uniform Declaratory Judgment Act or a similar provision in its own law, the Federal Courts have interpreted New York Law as having the requirements set forth in Section 11 in a clearly written decision which discusses declaratory judgments in general to be found in the case of Association for the Preservation of Freedom of Choice Inc. v. Wadmond, 215 F2d 648.

Accordingly, the failure of New York to enact the Uniform Declaratory Judgment Act or otherwise require all interested parties to be necessary parties to an action for declaratory judgment and then to declare the rights of non-joined parties is a direct violation of the notice and opportunity to be heard principles inherent in the "Due Process" of law clause contained in the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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New York, New York
January 13th, 1972.

APPENDIX A

MEMORANDUM OPINION OF NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

SUPREME COURT, APPELLATE DIVISION
First Department, May 1971

Owen McOlvern, J.P.
Arthur Markewich,
Aron Steuer,
Daniel E. Macken, JJ.

527 MADISON AVENUE COMPANY, a limited partnership, Plaintiff-Respondent, --against-- DeLOY EXECUTIVE SERVICE, INC., INGE F. DeVANEY and BARBARA E. JOLLY, Defendants-Appellants.	ACTION No. 1 Index No. 02912-1970 (in the Supreme Court) 3771 3772 3773 3774 3775 3776 3777
527 MADISON AVENUE COMPANY, a limited partnership, Petitioner-Landlord-Respondent, --against-- DeLOY EXECUTIVE SERVICE, INC.,	ACTION No. 2 Index No. L&T 85535-1970 (in the Civil Court)

Respondent-Tenant-
Appellant,

HERMAN A. STUHL, INGE F. DeVANEY and BARBARA E. JOLLY,

Respondents-Undertents-Appellants

AMER MARKET ASSOC., et al.

Respondents-Undertenants-Respondents.

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52 MADISON AVENUE COMPANY, a limited partnership,

Petitioner-Landlord-Respondent,

--against--

DeLOY EXECUTIVE SERVICE, INC.,

Respondent-Tenant-Appellant,

HERMAN A. STU L, INGE F. DeVANEY and BARBARA E. JOLLY,

Respondents-Undertenants-Appellants.

AMER. MARKET ASSOC.,

ACTION No. 3

Index No. L&T 85536-1970 (in the Civil Court)

Respondents-Under-tenants-Appellants.

DeLOY EXECUTIVE SERVICE, INC., ACTION No. 4

Plaintiff-Appellant,

--against--

Index No. 18962-1970 (in the Supreme Court)

527 MADISON AVENUE COMPANY, a limited partnership,

Defendant-Respondent.

HERMAN A. STUHL, individually, in his own behalf and in behalf of all tenants of DeLoy Executive Service, Inc., maintaining offices at #527 Madison Avenue, Borough of Manhattan, City, County and State of New York, similarly situated,

ACTION No. 5

Index No. 20485-1970 (in the Supreme Court)

Plaintiff-Appellant,

--against--

527 MADISON AVENUE COMPANY, a limited partnership, MADISON 54th REALTY COMPANY, a limited par nership, and

OPINION OF APPELLATE DIVISION

DeLOY EXECUTIVE SERVICE, INC., a New York Corporation,

Defendant-Respondents.

Consolidated appeals from:- (1) an order of the Supreme Court at Special Term (Theodore R. Kupferman, J.) entered December 1, 1970 in New York County, denying a motion by certain defendants to vacate a default declaratory judgment entered against them and to consolidate certain Civil Court summary proceedings with a Supreme Court action, (2) an order of said court (Theodore R. Kupferman, J.), entered December 23, 1970 denying a motion for reargument, (3) an order of said court (Theodore R. Kupferman, J.), entered December 18, 1970 denying a motion by plaintiff to consolidate certain Civil Court summary proceedings with a Supreme Court action, (4) an order of said court (Morris E. Spector, J.) entered March 11, 1971 granting the motion of one defendant for summary judgment dismissing the complaint against it, (5) an order of said court (Morris E. Spector, J.) entered March 10, 1971 granting the motion of defendant for summary judgment dismissing the complaint, (6) an order of said court (Theodore R. Kupferman, J.) entered December 1, 1970 denying the motion of plaintiff to enjoin certain Civil Court summary proceedings and (7) an order of said court (Theodore R. Kupferman, J.) entered December 11, 1970

denying the motion of plaintiff to enjoin certain Civil Court summary proceedings.

Herman A. Stuhl of counse (Mark G. Fresco, attorney) for appellants.

Arnold A. Jaffe of counsel (Moses & Singer, attorneys) for respondents.

West and Wolk for respondent 527 Madison Avenue Company.

PER CURIAM:

The seven appeals in the five related actions all depend on the outcome of the appeal in the action designated No. 1 by the parties. A skeletal statement of the facts and the proceedings is necessary to explain our conclusions. The building located at 527 Madison Avenue was owned by Madison 54th Realty Company. Negotiations were had in 1967 for a net lease of the building to 527 Madison Avenue Company (527), a limited partnership. Among the tenants was DeLoy Executive Service, Inc. (DeLoy) which had a ten-year lease on certain space. The lease was suspect on several grounds and 527 refused to go through with the negotiations unless the owner made a new lease with DeLoy. DeLoy and the owner thereupon negotiated a second lease for three years at a higher rental and for some time paid the rent as reserved in the second lease. However, DeLoy made a claim for additional space pursuant to an option in the first lease and, in the events following the claim and its rejection, indicated an intention to assert the viability of the first lease.

Action No. 1 was thereupon started. It was an action for a declaratory judgment declaring that the second lease superseded the first and was the lease under which DeLoy was occupying the space. No answer or notice of appearance was put in by DeLoy or its president, who was also named as a party. Upon the expiration of the second lease summary proceedings were instituted in the Civil Court. There were two proceedings, as DeLoy in addition to the space demised in the second lease was occupying other space pursuant to an assignment. These proceedings are designated Actions 2 and 3. DeLoy then moved in Action No. 1 to open its default and to consolidate the summary proceedings (Actions 2 and 3 with Action No. 1. Both motions, simultaneously handled, were denied by Special Term and the denial is the subject of the first appeal.

Special Term found that it was not shown that the default was due to excusable neglect and that there was no sufficient showing of merits. We are of the opinion that the record sustains both of these findings. However, included in the moving party's application was a claim that the summons in the action had never been served and a vacatur of the judgment was requested. Special Term unfortunately failed either to order a hearing on the traverse or otherwise deal with this phase of the application. Nevertheless we agree with the determination made. As noted, DeLoy also moved by separate order to show cause, which was heard at the same time and without objection was disposed of with the original application, to consolidate the Civil Court proceedings with

the declaratory judgment action. Such an application necessarily assumes the viability of the Supreme Court action, and relief is sought based on that assumption. It would be an inevitable conclusion if there was no service that not only must the judgment be vacated but that there was no action pending. The moving party herefore waived any defect in service and its application was limited to the relief of opening the default.

Appellant, while conceding that this was the law prior to the enactment of CPLR, claims that its provisions have effected a change. To an extent this is correct. The submission of an affidavit of merits, once constituting a general appearance (Revona Realty Corp. v. Wasserman, 4 A D 2d 444; Hammond v. Hammond, 9 A D 2d 615), now no longer does. Nor does any inconsistent ground for obtaining the same relief (Mutual Home Dealers Corp. v. Alves, 23 A D 2d 791). This is the limit of the statutory change and the decisional law. Here the appellant seeks to go beyond that by seeking unrelated relief based upon the assumption that jurisdiction had been obtained.

All of the remaining appeals are concluded by the determination of the appeal in Action No. 1.

Order (Kupferman, J.) entered December 1, 1970, in actions under Index No. 02912-1970 in the Supreme Court and L&T 85536-1970 in the Civil Court, affirmed with costs and disbursements.

OPINION OF APPELLATE DIVISION

Appeal from order (Kupferman, J.) entered December 23, 1970, in same, dismissed as non-appealable.

Order (Kupferman, J.) entered December 18, 1970, in actions under Index No. 20485-1970 in the Supreme Court and L&T 85535-1970 in the Civil Court, affirmed without costs.

Order (Spector, J.) entered March 11, 1971, in action Index No. 20485-1970, affirmed without costs.

Order (Spector, J.) entered March 10, 1971, in action Index No. 18962-1970, affirmed without costs.

Order (Kupferman, J.) entered December 1, 1970, in action Index No. 18962-1970, affirmed without costs.

Order (Kupferman, J.) entered December 11, 1970, in action Index No. 20485-1970, affirmed without costs.

ALL CONCUR

APPENDIX B

ORDER OF APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 3, 1971

Present - Hon. Owen McGivern, Justice Presiding,
Arthur Markewich,
Aron Steuer,
Danield E. Macken, Justices.

527 MADISON AVENUE COMPANY, a limited partnership, Plaintiff-Respondent, --against-- DeLOY EXECUTIVE SERVICE, INC., INGE F. DeVANEY and BARBARA E. JOLLY, Defendants-Appellants.	ACTION No. 1. Index No. 02912-1970 (in the Supreme Court) 3771 3772 3773 3774 3775 3776 3777
527 MADISON AVENUE COMPANY, a limited partnership, Petitioner-Landlord-Respondent, --against--	ACTION No. 2 Index No. L&T 85535-1970 (in the Civil Court)

DeLOY EXECUTIVE SERVICE, INC.,

Respondent-Tenant-
Appellant,

HERMAN A. STUHL, INGE F.
DeVANEY and BARBARA E. JOLLY,

Respondents-Under-
tenants-Appellants

AMER MARKET ASSOC., et al.,

Respondents-Under-
tenants-Respondents.

---

527 MADISON AVENUE COMPANY,
a limited partnership,

Petitioner-Landlord-
Respondent,

--against--

DeLOY EXECUTIVE SERVICE, INC.,

Respondent-Tenant-
Appellant,

HERMAN A. STUHL, INGE F. De
DeVANEY and BARBARA E. JOLLY,

Respondents-Under-
tenants-Appellants.

AMER MARKET ASSOC.,

ACTION No. 3

Index No.
L&T 85536-1970
(in the Civil
Court)

Respondents-Under-tenants-Respondents.

DeLOY EXECUTIVE SERVICE, INC., ACTION No. 4

Plaintiff-Appellant, Index No. 18962-1970 (in the Supreme Court)

--against--

527 MADISON AVENUE COMPANY, a limited partnership,

Defendant-Respondent.

HERMAN A. STUHL, individually, in his own behalf and in behalf of all tenants of DeLoy Executive Service, Inc., maintaining offices at #527 Madison Avenue, Borough of Manhattan, City, County and State of New York, similarly situated, ACTION No. 5 Index No. 20485-1970 (in the Supreme Court)

Plaintiff-Appellant,

--against--

527 MADISON AVENUE COMPANY, a limited partnership, MADISON 54th REALTY COMPANY, a limited partnership, and DeLOY EXECUTIVE SERVICE, INC. a New York Corporation,

Defendant-Respondents.

ORDER OF APPELLATE DIVISION

Appeals having been taken to this Court by the appellants from (1) the order of the Supreme Court, New York County (Kupferman, J.) entered on December 1, 1970, denying a motion by certain defendants to vacate a default declaratory judgment entered against them and to consolidate certain Civil Court summary proceedings with a Supreme Court action; (2) the order of said court (Kupferman, J.), entered on December 23, 1970, denying a motion for reargument; (3) the order of said court (Kupferman, J.), entered on December 18, 1970, denying a motion by plaintiff to consolidate certain Civil Court summary proceedings with a Supreme Court action; (4) the order of said court (Spector, J.), entered on March 11, 1971, granting the motion of one defendant for summary judgment dismissing the complaint against it; (5) the order of said court (Spector, J.), entered on March 10, 1971, granting the motion of defendant for summary judgment dismissing the complaint; (6) the order of said court (Kupferman, J.), entered on December 1, 1970, denying the motion of plaintiff to enjoin certain Civil Court summary proceedings; and (7) the order of said court (Kupferman, J.), entered on December 11, 1970, denying the motion of plaintiff to enjoin certain Civil Court summary proceedings,

And said appeals having been argued by Mr. Herman A. Stuhl, pro se, for the appellants, and by Mr. Arnold A. Jaffe of counsel for the respondents; and due deliberation having been had thereon, and upon the Per Curiam Opinion of this Court filed herein,

ORDER OF APPELLATE DIVISION

It is unanimously ordered that the order entered on December 1, 1970, in actions under Index No. 02912-1970 in the Supreme Court and L&T 85536-1970 in the Civil Court, be and the same hereby is affirmed. Respondent shall recover of appellants one bill of $50. costs and disbursements of this appeal.

It is further unanimously ordered the appeal from the order of said court entered on December 23, 1970, in same, be and the same hereby is dismissed as nonappealable, without costs and without disbursements.

And it is further unanimously ordered that the orders entered on March 11, 1971 (in action Index No. 20485-1970), March 10, 1971 (in action Index No. 18962-1970), December 1, 1970 (in action Index No. 18962-1970), December 11, 1970 (in action Index No. 20485-1970), and on December 18, 1970 (in actions under Index No. 20485-1970 in the Supreme Court and L&T 85535-1970 in the civil Court); be and the same hereby are affirmed, without costs and without disbursements. The order of this Court entered on June 1, 1971, is vacated.

ENTER:

/s/ Hyman W. Gamso
Clerk

APPENDIX C

OPINION OF THE TRIAL COURT

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

DeLOY EXECUTIVE SERVICE, INC.,

Plaintiff,

--against--

527 MADISON AVENUE COMPANY, a limited partnership,

Defendant.

MEMO

SPECTOR, J.:

Motions numbered 62 and 63 are consolidated for the purposes of this decision.

They are related actions. The action by DeLoy Executive Service, Inc. against Defendant 527 Madison Avenue Company (Madison) is an action to rescind the second of two leases entered into with Defendant's assignor. Plaintiff DeLoy entered into a written lease with Defendant's assignor on July 7, 1967 for a term of five years, expiring October 31, 1972 with an option to renew for an option to renew for an additional period of five years at an annual rental of $21,000. Thereafter a second

lease was executed between the same parties on October 1, 1967, for the same space for a term expiring on September 30, 1970, at a higher rental.

It is alleged that the second lease was entered into as the result of fraud and duress.

The action by Stuhl individually and in behalf of all tenants of DeLoy Executive Service, Inc. is against Defendant Madison, said Defendnat's assignor, and DeLoy Executive Service, Inc.

Stuhl alleges that he is a subtenant of DeLoy and seeks a declaratory judgment as to which lease governs his tenancy. He repeats the allegations in DeLoy's complaint.

Defendant Madison Company moves for summary judgment dismissing both action on the basis of its affirmative defense of res judicata and a further claim of a final judgment in a hold-over summary proceeding in the Civil Court, rendered in favor of Madison and awarding to Madison the possession of the subject premises.

Plaintiffs cross-move to dismiss the affirmative defense of Madison.

In January 1970, Madison commenced a declaratory judgment action against DeLoy Executive Service, Inc. for a determination that the second lease (the October 1967 lease) between Madison's assignor and DeLoy is valid and binding upon the parties superseding any alleged prior leases between them, including the July 1967 lease.

DeLoy defaulted in appearing and answering. Consequently, an inquest was held and judgment by default entered in Madison's favor on May 7, 1970, which decreed that the new lease (October 1967) was the valid subsisting lease between the parties thereto.

DeLoy made an application to vacate the judgment which was denied.

That judgment even though by default is res judicata against DeLoy's action against Madison, and the action must fall (Reich v. Cochran, 151 N.Y. 122; Fairview-Chase Corp. v. Scharf, 254 N.Y. 55).

The determination in the declaratory judgement action upheld the validity of the October 1967 lease, as the only lease existing between the parties covering the demised premises and superseding prior leases. Therefore, DeLoy's claim in this action against Madison, that the October 1967 lease was procured by fraud and duress may not be maintained on the ground of res judicata (Reich v. Cochran, supra; Fairview-Chase Corp. v. Scharf, supra).

Where the ultimate controlling issue has been decided in a prior action, i.e. the validity of the October 1967 lease, the determination therein is dispositive of any issue which would bear on the validity of the 1967 lease. The declaratory judgment action is conclusive upon the parties in any subsequent action involving the same cause of action, both to matters actually litigated and those matters which might have been litigated but were not

(Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 306-307; Ripley v. Storer, 309 N.Y. 506).

Furthermore, the final judgment in the holdover proceeding rendered in the Civil Court, New York County, against DeLoy and subtenants also bars the actions herein on the principle of res judicata (Reich v. Cochran, supra; Fairview-Chase Corp. v. Scharf, supra).

Aside from the principle of res judicata, Stuhl's action against Madison cannot be maintained by him as a subtenant. He has no standing to assert his landlord's rights especially where he is only a month to month tenant. No contractual liability arises between Stuhl a subtenant, and Madison, the paramount landlord, in connection with the October 1967 lease. There is no privity of contract between the subtenant Stuhl and Madison. (Stewart v. Long Island R.R. Co., 102 N.Y. 601), and a paramount landlord is not required to accept performance of the terms of the paramount lease by a subtenant, but can insist upon performance by the tenant with whom it is in privity (214 W. 39 Street Corp. v. Miss France Coats, Inc., 274 App. Div. 597). Hence, the subtenants are not necessary parties to a declaratory judgment action upholding the validity of the October 1967 lease.

Accordingly, the motion by Defendant 527 Madison Avenue Company is granted and the cross motions are denied.

Settle order.
Dated, February 24, 1971

/s/ M.E.S.
J.S.C.

APPENDIX D

ORDER OF THE TRIAL COURT

At a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 10th day of March, 1971.

P R E S E N T :

HON. MORRIS E. SPECTOR,

JUSTICE.

HERMAN A. STUHL, individually, in his own behalf and in behalf of all tenants of DeLoy Executive Service, Inc., maintaining offices at No. 527 Madison Avenue, Borough of Manhattan, City, County and State of New York, similarly situated,

Plaintiff,

--against--

527 MADISON AVENUE COMPANY, a limited partnership, MADISON 54th REALTY COMPANY, a limited partnership, and

Index No. 20485/1970

O R D E R

ORDER OF THE TRIAL COURT

DeLOY EXECUTIVE SERVICE, INC., a New York Corporation,

Defendant.

The Defendant 527 MADISON AVENUE COMPANY having made a motion for summary judgment dismissing Plaintiff's complaint and to vacate and/or modify the Plaintiff's notices for the examination before trial of the Defendants herein and the notices for the taking of interrogatories of the Defendants herein, and the Plaintiff having made a cross-motion to dismiss the affirmative defenses of the moving Defendant, and said applications having duly come on to be heard,

NOW, upon reading and filing the moving Defendant's said notice of motion dated January 6, 1971, together with the thereto annexed affirmation of Arnold A. Jaffe, dated January 6, 1971, and upon the order entered on December 1, 1970, in an action instituted by 527 Madison Avenue Company, Plaintiff, against DeLoy Executive Service, Inc., Defendant, (Index No. 02912/1970, and upon all the affidavits and other papers recited in said order, upon the pleadings in the above entitled action, upon the notice to take the testimony of the Defendants, dated December 28, 1970, and the Plaintiff's interrogatories to the Defendants, dated December 28, 1970, all in support of said motion, and the affidavit of Herman A. Stuhl, sworn to February 2, 1971, in opposition thereto, and the said cross-notice of motion by the

Plaintiff dated February 2, 1971, together with the thereto annexed affidavit of Herman A. Stuhl and Norman E. Rosenspan, sworn to February 2, 1971 and due deliberation having been had thereon, and the Court having considered the within motion and consolidated same with a motion returnable at the same time and pending in the action instituted by DeLoy Executive Service, Inc., Plaintiff, against 527 Madison Avenue Company, (Index No. 18962/1970) and having rendered one opinion dated February 24, 1970, with respect to the motions in all of said actions, it is on motion of Moses & Singer, attorneys for the Defendant 527 MADISON AVENUE COMPANY.

ORDERED, that the Defendant's motion be and the same is hereby granted in all respects; and it is further

ORDERED, that the Plaintiff's cross-motion to dismiss the affirmative defense of the Defendant is hereby denied in all respects; and it is further

ORDERED, that the Clerk of this Court be and he hereby is directed to enter judgment in favor of the said Defendant and against the Plaintiff, dismissing the complaint on the merits, together with the costs and disbursements of this action.

ENTER:

M. E. S.

J.S.C.

Filed
March 11, 1971
N.Y.
Co. Clerk's Office

FILED
FEB 17 1972

71-926

IN THE

Supreme Court of the United States

1972 - October Term
No.

HERMAN A. STUHL, individually, in his own behalf, and in behalf of all tenants of DeLoy Executive Service, Inc., maintaining offices at 527 Madison Avenue, Borough of Manhattan, City, County and State of New York, similarly situated,

Petitioner,

-against-

527 MADISON AVENUE COMPANY, a limited partnership,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI to the Appellate Division of the New York Supreme Court

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

HERMAN A. STUHL, individually, in his own behalf, and in behalf of all tenants of DeLoy Executive Service, Inc,, maintaining offices at No. 527 Madison Avenue, Borough of Manhattan, City, County and State of New York, similarly situated,

Petitioner,

-v-

527 MADISON AVENUE COMPANY, a limited partnership,

Respondent.

RESPONDENT'S BRIEF
IN OPPOSITION TO A
PETITION FOR A WRIT OF CERTIORARI
to the Appellate Division of the
New York Supreme Court

OPINION BELOW

The opinion of the Appellate Division of the New York Supreme Court, First Judicial Department is reported at 36 A.D. 2d 502, 321 NYS 2d 811.

JURISDICTION

The order of the Appellate Division of the New York Supreme Court, First Judicial Department, entered on June 3, 1971, affirmed the judgment of the New York Supreme Court dismissing petitioner's complaint. Petitioner is incorrect in describing the order of the Appellate Division as a judgment. (Petition pp 22-26). On November 17, 1971, the New York Court of Appeals denied the petitioner's motion for leave to appeal to said Court. While the jurisdiction of this Court is invoked under 28 USCA 1257 (3), that jurisdiction fails, as the order appealed from is adequately supported by independent state grounds.

QUESTIONS PRESENTED

1. Whether the "Due Process" clause of the Fourteenth Amendment to the United States Constitution was violated, as claimed by petitioner, when his suit in the New York Supreme Court for a judgment declaring his rights to occupy real property was dismissed, without stating a disposition upon Federal constitutional grounds, upon several independent state grounds, namely (a) that the final judgments in the summary proceedings rendered

in the New York County Civil Court, wherein petitioner was a party, barred the action on the principle of res judicata (Petition p. 30) and (b) that petitioner, a month-to-month subtenant, had no standing to assert his landlord's rights (Ibid p. 30).

2. Whether the "Due Process" clause of the Fourteenth Amendment was violated, as claimed by petitioner, when the New York Supreme Court declared the rights between a landlord and tenant in Action No. 1 (See captions in Appellate Division opinion Petition at p. 14), without requiring petitioner, as subtenant, to be joined as a necessary party, and whether this issue is relevant and necessary to decide as the rights of petitioner, as subtenant or otherwise, were adjudicated in the summary proceedings in which petitioner was a party (Actions Nos. 2 and 3), so that the petioner's declaratory judgment action (Action No. 5), the subject of the within application) was resolved upon the non-constitutional grounds set forth in Question No. 1.

STATEMENT OF FACTS

The opinions of the Appellate Division (Petition p. 14) and Special Term (Ibid pp 27-30) disclose the basic facts. Negotiations were had in 1967 for a lease of the building to 527 Madison Avenue Company (527 Madison), a limited partnership. Among the tenants was DeLoy Executive Service, Inc. (DeLoy) which had a ten-year

lease on certain space. The lease was suspect on several grounds and 527 Madison refused to go through with the negotiations unless the owner made a new lease with DeLoy. DeLoy and the owner thereupon negotiated a second lease for three years at a higher rental and for some time paid the rent as reserved in the second lease. However, DeLoy made a claim for additional space pursuant to an option in the first lease and, in the events following the claim and its rejection, indicated an intention to assert the viability of the first lease.

Action No. 1 was thereupon started. It was an action for a declaratory judgment declaring that the second lease superseded the first and was the lease under which DeLoy was occupying the space. No answer or notice of appearance was put in by DeLoy or its president, who was also named as a party. Consequently, an inquest was held and judgment by default entered in 527 Madison's favor, decreeing that the new lease was the valid and existing lease between the parties. Upon the expiration of the second lease, summary proceedings were instituted in the Civil Court against DeLoy and others, including the petitioner herein (Stuhl). There were two proceedings, as DeLoy, in addition to the space demised in the second lease, was occupying other space pursuant to an assignment. These proceedings were designated by the Appellate Division as Actions 2 and 3. (Petition p. 19.)

DeLoy, the main tenant, thereupon instituted an action (Action No. 4) in the New York Supreme Court to rescind the second lease. Special Term summarily dismissed this action (Petition p. 29) on motion by 527 Madison, on the basis of its affirmative defense of res judicata, and the order was affirmed by the Appellate Division. No application is made in this Court by DeLoy, the main tenant.

The petitioner likewise instituted an action in the New York Supreme Court to declare that he had an interest in the said premises (Action No. 5), which action was also summarily dismissed on motion by 527 Madison. The opinion of Special Term indicates that the Court's decision was based not on federal constitutional grounds, but rather on the following state grounds: (a) the final judgment in the summary proceeding, in which petitioner was a party, directed petitioner's removal from said premises and adjudicated that he had no rights therein; and (b) the petitioner as subtenant had no standing to assert his landlord's rights (Petition p. 30). The Appellate Division's order dated June 3, 1971 (Petition pp 22-26) affirmed the judgment dismissing the complaint.

On November 17, 1971, the New York Court of Appeals denied petitioner's motion for leave to appeal from the judgment of the Appellate Division of the New York Supreme Court.

ARGUMENT

Adequate Independent State Grounds

It is an axiomatic rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the Supreme Court lacks jurisdiction to review the judgment if the non-federal ground is independent of the federal ground and adequate to support the judgment (Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, Fox Film Corp. v. Muller, 296 U.S. 207).

The petitioner (Stuhl) argues that Special Term denied him due process of law when it dismissed his declaratory judgment action. He bases his claim on the allegation that the Court's decision rested on the res judicata effect of the earlier declaratory judgment action instituted by Madison, to which Stuhl was not made a party. But an examination of the opinion of the Court at Special Term, which dismissed the petitioner's action (Action No. 5, the subject of the within application), discloses that the judgment below was based upon two non-constitutional grounds, as follows:

1. That the final judgments in the summary holdover proceedings (Actions Nos. 2 and 3) obtained by 527 Madison as landlord, ordering the eviction of the petitioner, a party thereto, were res judicata of the petitioner's action for a

declaratory judgment seeking to establish a lessee's interest in said premises. Not only is this proposition axiomatic throughout Anglo-American jurisdictions, but in any event the opinion of Special Term cites for such proposition authorities from the highest appellate court in New York State (Petition p. 30).

2. That the petitioner, as a month-to-month subtenant, had no standing to assert his landlord's rights. The opinion at Special Term stating the ground for lack of standing of the petitioner, is repeated herein for the convenience of this Court, as follows:

> "He has no standing to assert his landlord's rights especially where he is only a month-to-month tenant. No contractual liability arises between Stuhl a subtenant, and Madison, the paramount landlord, in connection with the October 1967 lease. There is no privity of contract between the subtenant Stuhl and Madison. (Stewart v. Long Island R.R. Co., 102 N.Y. 601), and a paramount landlord is not required to accept performance of the terms of the paramount lease by a subtenant, but can insist upon performance by the tenant with whom it is in privity (214 W. 39 Street Corp. v. Miss France Coats, Inc., 274 App.Div. 597). Hence, the subtenants are not necessary parties

to a declaratory judgment action upholding the validity of the October 1967 lease."

Accordingly, the order which is the subject of the petition herein was decided on non-constitutional grounds and thus raises no federal question. A fortiori, even if a federal question was raised, the petition does not establish the importance of this case to justify the granting of a writ of certiorari.

CONCLUSION

For the reasons above stated, respondent respectfully prays that certiorari be denied.

Respectfully submitted,

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New York, New York 10019
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New York, New York
February 17, 1972